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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 590

C. EDWARD DAVIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

D. H. REDFEARN,
R. H. FERRELL,
Counsel for Petitioner.

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In petitioner's brief he stated that the government's motion to the Superior Court of Murray County, Georgia, for the delivery of the deed in question to postal inspector McKew was a subterfuge and misrepresentation (R. 8, 9). The government in its reply brief states that there is no support in the proof for this assertion (Br. 6). Nevertheless, as a justification for said motion the government admits an "examination of the deed itself might disclose that it was a forgery" (Br. 4, note 2). This confession is a strong suggestion that the motion was a subterfuge. There is no allegation in the motion itself that the govern-

ment had reason even to believe that the deed in question was a forgery and that the original was necessary in an examination to establish such an issue.

Proof of a subterfuge is seldom ever established by direct testimony. It is arrived at by circumstantial evidence and deductions. That the motion as filed was a subterfuge and a misrepresentation is established by the fact that a postal inspector was in charge of the case and that it was to him that the deed was committed as the agent of the United States district attorney. By what statutory authority has a postal inspector become an officer of the government to examine and quiet titles to land owned by the government? It is common knowledge that postal inspectors' duties include ferreting out crimes in connection with the handling and transportation of mails. It should be remembered that said postal inspector had approached said clerk several weeks before the deed was received by him and said clerk was warned by said postal inspector to advise him when the deed was received. Was this official act on the part of a postal inspector an act of precaution on the part of the government to remove a cloud on the titles to land? It could hardly have been such for at that time the cloud on the titles to the lands involved did not even exist. The deed had not yet been filed with the clerk. The interest of said inspector, therefore, must have been prompted by an anticipated commission of some crime involving the mails. Clouds on the title per se do not involve crime. His interest had to relate to some other federal law than that involved in determining the validity of titles to lands owned by the government. The petition on its face, the admission of the assistant district attorney, Astor Merritt, that the subsequent examination of the deed by the district attorney revealed facts "sufficient to authorize a criminal investigation", and now the confession of the government that an "examination of the deed itself might disclose that it was

a forgery", which fact would be relevant to a proceeding to quiet title, prove conclusively that the motivating cause beginning with the visit of said postal inspector to said clerk and his instructions given him together with his action before the Superior Court of Murray County and ending with the serving of the subpoena duces tecum by the marshal on said clerk simultaneously with its return to the clerk by said postal inspector was to get possession of a deed which they secretly believed to be forged.

The government in its brief states that petitioner does not contend "that the state court lacked statutory authority to give such directions to its clerk" (Br., 4, note 3). It then cites several sections of the Georgia Code in the hope apparently to influence the court to believe that authority of law did exist for the action taken by the Superior Court Judge. But an examination of these sections shows that they do not apply even remotely. Petitioner not only contends that there was no statutory authority for the action of the district attorney at Atlanta and the judge of said Superior Court, but there was no authority of any kind which authorized the filing of such an ex parte petition by a district attorney of the United States government and the entering of an order thereon requiring said clerk to deliver to a postal inspector a deed to be retained by him for a period of thirty days (R. 10). The court was absolutely without jurisdiction either of the subject matter or of the parties. So, whatever order it may have entered was of no force and effect. The government has failed to cite one authority which supports the procedure followed by the district attorney in Atlanta by which he originally gained possession of the deed in question and learned sufficient facts which suggested a criminal investigation.

That the proceedings before said judge was a subterfuge is suggested also by the fact that it was instituted without

the authority of the attorney general or the secretary of agriculture. The motion of the government acting through the district attorney at Atlanta was predicated on the theory that it was a step on the part of the government to remove a cloud from the title of lands owned by the government but it never proved or showed that the action was taken with the permission of the attorney general at the suggestion of the secretary of agriculture who had exclusive jurisdiction of the government's public lands. On the other hand it was admitted by the government that permission had not been obtained (R. 47). If the motion was such a step and was undertaken without such authority the entire proceeding was ineffective.

16 U. S. C. A., Section 472; 5 U. S. C. A., Section 313;
United States v. *Samuel R. Throckmorton, et al.*, 98 U. S. 61 (1), 70;
San Jacinto Tin Company, et al. v. *United States*, 125 U. S. 273 (2), 308.

The government states that the clerk of the Superior Court of Murray County alleged in his response on March 30, 1942, that petitioner had moved in the Superior Court of Murray County for an order directing the clerk to return the deed to him and that the court had ordered the deed retained by the clerk (Br. 5, note 5). This does not change the status of the original taking on December 8th and 9th, 1941 (R. 10, 11), which was without authority of law and which was in violation of petitioner's constitutional rights. Every lawful act which may have been undertaken by the government after the first illegal taking would not purge the original taking of its illegality.

Respectfully submitted,

D. H. REDFEARN,
R. H. FERRELL.